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Supreme Court, U.S.
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Case No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ARLENE B. SINGER, et al.,

Petitioner,

vs.

SHANNON & LUCHS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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A. QUESTIONS PRESENTED FOR REVIEW

1. Is a motion for attorneys' fees filed more than eleven months after an appellate decision timely?

2. Does the Fifth Amendment Due Process Clause require federal courts of appeals to provide notice and a hearing before imposing sanctions under Rule 38 of the Federal Rules of Appellate Procedure?

In the
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I
PETITION

Petitioners respectfully pray, pursuant to 28 U.S.C. Section 1254, that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 3, 1989.

A. QUESTIONS PRESENTED FOR REVIEW

1. Is a motion for attorneys' fees filed more than eleven months after an appellate decision timely?

2. Does the Fifth Amendment Due Process Clause require federal courts of appeals to provide notice and a hearing before imposing sanctions under Rule 38 of the Federal Rules of Appellate Procedure?

B. PARTIES INVOLVED

The parties involved in the proceeding below are:
I. Arlene B. Singer and Joel D. Joseph, Appellants.
II. Shannon & Luchs Company, Appellee.

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D. REFERENCE TO OFFICIAL REPORTS

The decision of the District of Columbia Circuit of March 3, 1989 has not yet been reported. It is reproduced at page 00 of the appendix to this petition. An earlier decision of the Court of Appeals in this case was reported at 779 F.2d 69 (December 10, 1985).

E. JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(1). The time requirements of 28 U.S.C. Section 2101 have been met.

1. The date of the judgment or decision that is sought to be reviewed is March 3, 1989.

2. Petitioners' motion for reconsideration was denied on March 3, 1989.

3. No cross petition for a writ of certiorari was filed.

4. Jurisdiction is supported under Rule 17.1(a) and 17.1(c) in that the instant case involves an important question of federal law which should be settled by this court; the decision of the District of Columbia Circuit is in conflict with decisions of other circuits, which are detailed in Section G; and the decision of the District of Columbia Circuit conflicts with decisions of this court.

F. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

G. STATEMENT OF THE CASE

Petitioners entered into two contracts with respondent, one a listing agreement to sell their District of Columbia house and the other an equity advance agreement, which provided that if the house did not sell within a certain period, that respondents would arrange for a bridge loan so that petitioners could move into a new home. The house

did not sell and a six month loan for $90,000 was arranged with a bank. Unbeknownst to petitioners the loan was guaranteed by respondents. Because the house remained unsold petitioners asked for an extension of the loan, but no extension was granted. When the note became overdue respondents paid the note to the bank and the note was assigned to it.

Petitioners filed suit against respondent in the federal district court for the District of Columbia claiming that respondent had breached the listing agreement by failing to make good faith efforts to sell their house, for violating a District of Columiba law which prohibited "balloon" payment mortgages, for conflicts of interest regarding the interest that they secretly obtained in petitioners' property and for illegally fixing the rate for real estate commissions. Diversity jurisdiction was alleged in the complaint. Respondent filed a counterclaim on the note, and sought attorneys' fees based on the deed of trust. The counterclaim and the District of Columbia statutory claim were decided on a motion for summary judgment. The federal antitrust claim, the conflict of interest and the breach of contract claims were settled by the parties, leaving only the issue of attorneys' fees.

The attorneys' fees aspect of this case was before the court of appeals on three occasions. In the first appeal an award of $15,000.00 for attorneys' fees was summarily reversed (January 26, 1983, before Judges Robinson, Wilkey and Ginsburg) on the grounds that the "record reveals an absence of any documentation whatsoever of the legal services rendered in this case. Some documentation is required to enable the District Court to determine a reasonable and equitable fee and to afford the opposing party an opportunity to present legitimate objections." On that appeal the court awarded appellants costs and denied costs to appellees.

On remand the district court awarded $78,115.60 for attorneys' fees and expenses. Once again the court of appeals reversed. 779 F.2d 69 (December 10, 1985, Judges Wright, Edwards and Davis). On remand the district court again awarded substantial attorneys' fees and the court of appeals, after oral argument, affirmed without an opinion on November 20, 1987. A petition for reconsideration was denied on January 19, 1988. This court denied a petition for certiorari on October 3, 1988. No. 87-1928.

On October 31, 1988, more than eleven months after the

court of appeals affirmance, Shannon & Luchs Company filed a motion for attorneys' fees for the appeal. Nowhere in the motion was Rule 38 of the Rules of Appellate Procedure mentioned. Petitioners opposed the motion as being untimely.

The Court of Appeals granted the motion for $13,163.00. Petitioners asked for rehearing, citing decisions and rules in other circuits, demonstrating that the motion was untimely. The court of appeals denied the motion but ruled "post hoc" that the appeal was "frivolous" and that the appellate attorneys fees were awarded pursuant to Rule 38.

H. REASONS FOR ALLOWANCE OF THE WRIT

1. THE COURT OF APPEALS DECISION DIRECTLY CONTRADICTS RULINGS OF THIS COURT.

The right to notice and the right to be heard are fundamental rights which this court has upheld on numerous occasions. The Court of Appeals, in response to a petition for rehearing, rationalized its earlier ruling which awarded attorneys fees to appellee. The Court's mention of its reliance on Rule 38, and that the last appeal was "frivolous" was the first mention of that rule, or "frivolousness" in this case. The litigants and their attorneys had the constitutional right to be put on notice that the appeal was frivolous and be given an opportunity to be heard to show that the appeal was not frivolous.

In fact the appeal was not frivolous in any manner. The opposing party never even made such a claim. The Court of Appeals heard oral argument in the case, and its own rules provide that frivolous cases are not to be accorded oral arguments. Rule 13(i)(2). The case had been before the court twice before, however in both earlier cases the petitioners had prevailed, first summarily.

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) this court ruled that as sanctions, "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Attorneys fees in this case were assessed "lightly" and without any notice or any possibility of a hearing. Further, in this case, unlike most cases, the attorneys fees were awarded against the

parties, not the attorneys for the parties. Neither the parties nor their attorneys had an opportunity to present evidence or argument that the appeal was not frivolous. Holding both appellants jointly and severally liable, even though one appellant had no legal training nor sophistication, is taking the issue of attorneys' fees very lightly. This court should restrict the lower federal courts in awarding attorneys fees without an opportunity for the parties to demonstrate that the appeal was not frivolous. Petitioners recognize that the courts are crowded with unnecessary cases, but that does not justify a taking of property without due process of law. Anyone accused of taking a frivolous appeal must be give the opportunity to object. Branding a lawyer or a party with a finding of "frivolous" is a serious matter which should be accorded notice and hearing.

2. THE RULING OF THE COURT OF APPEALS IS IN CONFLICT WITH RULINGS OF OTHER CIRCUITS.

Many of the other circuit courts have specified by rule or court decision that motions for attorneys fees shall be filed within either 14 or 30 days. Only the District of Columbia Circuit Court of Appeals has ruled that motions for attorneys fees can be filed a year or more after a decision on the merits. In the Federal Circuit the motion shall be filed within 30 days. Rule 20. In the Third Circuit motions shall be filed within 30 days, unless a petition for rehearing has been filed. Rule 27.

The Fifth and Eighth Circuits allow only 14 days. Eight Circuit Rule 17. In *Knoblauch v. Commissioner*, 752 F.2d 125, 127 (5th Cir., 1985) the Fifth Circuit explained that the 14 day period applied because the motion is either a petition for rehearing or a bill of costs, and concerning both the same time period applies. The Ninth Circuit allows 30 days for the motion, unless a petition for rehearing is filed. Rule 39-1.

CONCLUSION

Designation of a case as "frivolous," and the concomitant award of attorneys fees, should not be made without notice or opportunity for a hearing. Post-judgment motions for attorneys fees should be made within 14 days (or 30 days), but not a year after the decision on the merits.

Litigants have a right to know when a case has ended and should not have to wait years, knowing that opposing counsel could file a Rule 38 motion at any time, without good cause having to be shown for lateness. The American Rule is being undermined by an avalanche of awards of attorneys fees. The award in this case violates our sacred principles of notice and due process, as well as creating an unnecessary exception which will encourage litigants to file tardy post-decision motions for attorneys fees. This case presents substantial federal questions which this court has not, but should, clarify.

For all of these reasons the petition should be granted.

Respectfully submitted,

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II. APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7053 September Term, 1988

Arlene B. Singer, et al.,

Appellants

v. Filed: January 5, 1989
Contance L. Dupre, Clerk

Shannon & Luchs Company,

Appellee

BEFORE: Robinson and Williams Circuit Judges, and Gordon Senior District Judge, United States District Court for the Eastern District of Wisconsin

ORDER

Upon consideration of appellee's Motion for Appellate Attorneys' Fees, the opposition thereto and of the reply it is

ORDERED, by the Court, that appellee's motion is granted and attorneys' fees in the amount of $13,163.00 are awarded to appellee and taxed jointly and severally against Arlene B Singer and Joel D. Joseph.

The Clerk is directed to transmit a certified copy of this order to the District Court.

FOR THE COURT:

CONTANCE L. DUPRE, CLERK

BY: Robert A Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed March 3, 1989

No. 87-7053

ARLENE B. SINGER, et al., APPELLANTS

v.

SHANNON & LUCHS COMPANY, et al.

On Petition for Rehearing of
Award of Attorneys' Fees

Before: ROBINSON and WILLIAMS, *Circuit Judges*, and GORDON,* *Senior District Judge.*

Opinion Per Curiam.

ORDER

Upon consideration of appellants' Petition for Rehearing it is

ORDERED, by the court, that the petition is denied, as is more fully set forth in the opinion of the Court filed herein this date.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

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* Of the United States District Court for the Eastern District of Wisconsin, sitting by designation pursuant to 28 U.S.C. § 294(d).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

PER CURIAM: Plaintiff-appellants, Arlene B. Singer and Joel D. Joseph, have petitioned for rehearing of our order granting Shannon & Luchs's motion for attorneys' fees. Their objection is that Shannon & Luchs's motion was filed nearly a year after our unpublished judgment in its favor and was therefore in violation of Fed. R. App. P. 39's requirement that a bill of costs thereunder be filed within 14 days of entry of judgment. We write briefly to explain that our order was based upon Fed. R. App. P. 38 and that, under its terms and in the absence of any rule of this court to the contrary, there is no time limit for motions under Rule 38 other than the principles of laches.

Rule 38 states in its entirety:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Plainly its language imposes no time limit on the filing of a bill of costs. Indeed, some courts regard the interest in discouraging frivolous appeals as so compelling that no motion is necessary, and they award Rule 38 costs sua sponte. See, e.g., *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1200-03 (7th Cir. 1987).

Other circuit courts have held that while the term "costs" in Rule 39 excludes attorneys' fees, the reference in Rule 38 to "just damages and single or double costs" comprises them. See, e.g., *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3rd Cir. 1986); *District No. 8, Int'l Ass'n of Machinists & Aerospace Workers v. Clearing*, 807 F.2d 618, 623 (7th Cir. 1986); *Nagy v. Jostens, Inc.*, 787 F.2d 446, 447 (8th Cir. 1986); *Hewitt v. City of Stanton*, 798 F.2d 1230, 1233 (9th Cir. 1986); *Triola v. Department of Transportation*, 769 F.2d 760, 762 (Fed. Cir. 1985) (citing *Moir v. Department of Treasury*, 754 F.2d 341 (Fed. Cir. 1985), a Rule 38 case).

There is a dictum to the contrary in *Montgomery & Associates, Inc. v. CFTC*, 816 F.2d 783, 784 (D.C. Cir. 1987), but it provides no basis for rejecting the views of our sister circuits. The case concerned a fees motion under 7 U.S.C. § 18(e) and simply held that the time limit of Rule 39(d) should be applied to a fees motion filed thereunder. The dictum as to Rule 38 was part of a general argument as to the unwisdom of allowing claims for attorneys' fees without fixed time limits (i.e., an argument that laches is an inadequate limit in any circumstance). Its sole authority for the idea that Rule 38 costs do not encompass attorneys' fees was *Seyler v. Seyler*, 678 F.2d 29, 31 (5th Cir. 1982). In fact that decision is quite the opposite. In awarding attorneys' fees it rejected the losing party's claim that Rule 39's 14-day time applied. The court explained that Rule 39 did *not* encompass attorneys' fees, but that Rule 38 "provide[d] penalties for [frivolous] appeals," 678 F.2d at 31, and did encompass them. The outcome made clear that the court did not consider Rule 39(d)'s time limitation applicable by osmosis to Rule 38 applications, and did not speak to any other possible limits.

Montgomery & Associates cannot be said to establish a general rule of the circuit that it is impermissible to allow fee requests limited (in time of application) only by laches. Such a notion would be inconsistent with prior circuit law. See *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 5-6 (D.C. Cir. 1982) (per curiam) (a motion for attorneys' fees under 42 U.S.C. § 7607(f) (1982), which defines "costs" as including attorneys' fees, is not subject to the 14-day limit of Rule 39(d)); *Environmental Defense Fund v. EPA*, 672 F.2d 42, 61 (D.C. Cir. 1982) (because 15 U.S.C. § 2618(d) expressly distinguishes attorneys' fees from costs, equity supplies only time limitation for attorneys' fees).

The allowance of an application under Rule 38 long after the time will have expired for a bill of costs under

Rule 39 is justified by the special purpose of the former rule. It seeks to deter and punish frivolous appeals. The social interest in so doing, and the standard of egregiously objectionable conduct that triggers its application, justify imposing fewer technical restrictions.

The appeal in this case was frivolous. Whatever the limit implicit in laches, the delay in this case does not reach it.

We conclude with the following dictum of our own, offered in the hopes of forestalling further litigation: in light of the brevity of our previous order, and the relative length of this opinion, the latest petition for rehearing was not itself frivolous.

Rehearing denied.